

THE HONORABLE RONALD B. LEIGHTON

U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

NICOLE and GUY MAEL, NADINE  
VIGLIANO, BRITNEY MOREA, CAROL  
CONWAY, ANGELA BERTUCCI and TINA  
WIEPERT, on behalf of themselves and all  
others similarly situated,

Plaintiffs,

vs.

EVANGER'S DOG AND CAT FOOD  
CO., INC., NUTRIPACK, LLC, AGAINST THE  
GRAIN PET FOODS, and SHER SERVICES  
COMPANY INCORPORATED,

Defendants.

NO. 3:17-cv-05469-RBL

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

Plaintiffs Nicole and Guy Mael, Nadine Vigliano, Britney Morea, Angela Bertucci, and Tina Wiepert ("Plaintiffs") on behalf of themselves and a proposed Settlement Class and Evanger's Dog and Cat Food Co., Inc., Nutripack, LLC, Against the Grain Pet Foods, and Sher Services Company Inc. ("Defendants") have entered into a Settlement Agreement. Plaintiffs and Defendants together constitute the "Parties,"

Plaintiffs have moved for, and Defendants do not oppose, entry of this order, which (a) conditionally certifies the Settlement Class (as defined below) for settlement purposes only; (b) preliminarily approves the proposed Settlement as fair, reasonable and adequate; (c)

ORDER GRANTING PLAINTIFFS' MOTION FOR  
PRELIMINARY APPROVAL OF CLASS ACTION  
SETTLEMENT - 1

CASE No. 3:17-cv-05469-RBL

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1 appoints the Settlement Administrator; (d) provides for notice of the Settlement Agreement to  
 2 Settlement Class members in accordance with the terms of the Settlement Agreement; (e)  
 3 establishes procedures for objecting to, and opting out of, the proposed Settlement Agreement;  
 4 (f) describes procedures for submitting claims; and (g) sets a date for hearing to finally approve  
 5 the Settlement Agreement (“Final Approval Hearing”).

6 The Court has considered the Settlement Agreement (Dkt. No. 116-1), the declarations  
 7 of Plaintiffs’ counsel (Dkt. Nos. 116 & 117), and the declaration of the Settlement  
 8 Administrator (Dkt. No. 118).

9 **IT IS ORDERED THAT:**

10 1. The Court has jurisdiction over the subject matter of this Action and personal  
 11 jurisdiction over the Parties and the conditionally certified Settlement Class, as defined below.

12 2. This Order incorporates by reference the definitions in the Settlement  
 13 Agreement, and all capitalized terms used in this Order will have the same meanings as set  
 14 forth in the Settlement Agreement, unless otherwise defined in this Order.

15 3. Solely for the purposes of effectuating the proposed settlement, the Parties have  
 16 agreed to and the Court provisionally certifies the following “Settlement Class:”

17 All persons in the United States who purchased (i) Evanger’s Hunk of Beef,  
 18 (ii) Evanger’s Braised Beef, or (iii) Against the Grain Pulled Beef with Gravy  
 19 between the dates of December 1, 2015 and June 30, 2017.

20 4. The Court finds that conditional certification of the Settlement Class for  
 21 settlement purposes only is appropriate under Federal Rule of Civil Procedure 23(a) and (b)(3).

22 a. Numerosity is satisfied because the parties agree that the class consists of  
 23 at least 2,592 members. *Rannis v. Recchia*, 380 F. App’x 646, 651 (9th  
 24 Cir. 2010) (numerosity is generally satisfied when a class has at least 40  
 25 members).

26 b. The test for common questions of law and fact is “qualitative rather than  
 27 quantitative—one significant issue common to the class may be

sufficient to warrant certification.” *See Gray’s Harbor Adventist Christ School v. Carrier Corp.*, 242 F.R.D. 568, 572 (W.D. Wash. 2007). In this case, the members of the Class share common issues of fact and law for certification for settlement purposes regarding (1) whether Defendants misrepresented the quality of Evanger’s Hunk of Beef, Evanger’s Braised Beef, or Against the Grain Pulled Beef with Gravy (collectively the “Pet Food”); (2) whether any alleged misrepresentations relating to the Pet Food are material to a reasonable consumer; and (3) whether Defendants’ conduct violated consumer protection laws turn on common evidence and can be fairly resolved for all class members at once. *See In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 973 (C.D. Cal. 2015) (identifying similar common questions). For certification for settlement purposes, these are questions that if resolved for one class member, could be resolved for all class members.

- c. Typicality is satisfied for settlement purposes only because Plaintiffs’ claims arise from the same course of alleged conduct as all Settlement Class Members’ claims: misrepresentations of the quality of the pet Food. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (typicality exists when class representatives and class members are subjected to and injured by the same course of conduct).
- d. Adequacy is satisfied because Plaintiffs have no conflicts of interest with the other proposed class members, have demonstrated their commitment to the class by actively participating in the litigation, and have retained qualified and committed counsel. *Ellis*, 657 F.3d at 985 (citation omitted).

- 1 e. Predominance is satisfied for settlement purposes because the common  
 2 questions could predominate over any questions affecting only individual  
 3 Settlement Class Members. For example, one potential predominant  
 4 question is whether a reasonable person would have been misled by  
 5 Defendants' advertisements. *In re Hyundai and Kia Fuel Econ. Litig.*,  
 6 926 F.3d 539, 559 (9th Cir. 2019) (holding predominance "readily met"  
 7 where "class members were exposed to uniform . . . misrepresentations  
 8 and suffered identical injuries within only a small range of damages.")).  
 9 Class treatment here, in the context of the Settlement, will facilitate the  
 10 favorable resolution of all class members' potential claims.
- 11 f. Superiority is satisfied because classwide resolution is the most efficient  
 12 and fair method of addressing the claims that arise out of the alleged  
 13 conduct in this case. There are thousands of class members with modest  
 14 individual claims, most of whom likely lack the resources necessary to  
 15 seek individual legal redress. *See Local Joint Exec. Bd. of Culinary/  
 16 Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163  
 17 (9th Cir. 2001) (cases involving "multiple claims for relatively small  
 18 individual sums" are particularly well suited to class treatment); *see also*  
 19 *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir.  
 20 2010) ("Where recovery on an individual basis would be dwarfed by the  
 21 cost of litigating on an individual basis, this factor weighs in favor of  
 22 class certification.").
- 23 g. Because certification of the Class is proposed in the context of a  
 24 settlement, the court need not inquire whether the case, if tried as a class  
 25 action, would present intractable management problems.  
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1           5.       The Court preliminarily approves the Settlement as fair, reasonable, and  
 2 adequate. In making this determination, the Court has considered the criteria set forth in  
 3 recently amended Federal Rule of Civil Procedure 23, and the factors outlined in *Hanlon v.*  
 4 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998), and *Churchill Village, L.L.C. v. General*  
 5 *Electric*, 361 F.3d 566, 575-76 (9th Cir. 2004).

6           6.       Under the Settlement, Evanger's agrees to pay \$545,500 into a Settlement Fund  
 7 that the Parties propose to use to (1) make payments to all Settlement Class Members who  
 8 submit timely and valid claims for cash payments; (2) pay the Settlement Administrator the  
 9 costs of notice and Settlement Administration Costs in an amount capped at \$150,000; (3) pay  
 10 Service Awards in the amount of \$2,500 to each Class Representative; and (4) pay Class  
 11 Counsel's attorneys' fees and costs in an amount not to exceed \$295,000. The Settlement also  
 12 gives Settlement Class Members the option to redeem product certificates in lieu of a cash  
 13 payment. Settlement Class Members with proof of purchase either from their own records or  
 14 from records obtained during the litigation have the option of choosing a certificate worth 50%  
 15 of the verified value of their total Pet Food purchases. Settlement Class Members who lack  
 16 proof of purchase may submit a claim to receive a certificate for three (3) cans of Defendants'  
 17 products.

18           7.       The Settlement also provides prospective relief. Defendants have agreed to  
 19 change to their advertising practices, fund additional third-party testing of the Pet Food, notify  
 20 their distributors and retailers of these practice changes, and confirm in writing that they are in  
 21 compliance with all FDA requirements regarding supplier and ingredient safety for the beef  
 22 they use in the Pet Food. The Settlement Fund is non-reversionary and any amounts remaining  
 23 after the initial distribution to Settlement Class Members and a second distribution, if necessary  
 24 and administratively feasible, will be distributed to North Shore Animal League America.

25           8.       The Court has considered the terms of the Settlement Agreement in light of  
 26 Plaintiffs' and Class Counsel's representation of the Settlement Class, the arm's length  
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1 negotiations that led to the Settlement, the experience and views of counsel, the equitable  
 2 treatment of Settlement Class members, and the relief that will be provided to the Settlement  
 3 Class. In preliminarily approving the relief to the Settlement Class, the Court has considered,  
 4 among other things, the amount offered in settlement, the stage of the proceedings, the strength  
 5 of Plaintiffs' case and the costs, risks, and delay of continued litigation; the method of  
 6 distributing relief to the class, which will include the option of electronic payments; and the  
 7 proposed attorneys' fee award and service awards to Plaintiffs.

8         9. Plaintiffs' motion to preliminarily approve the Settlement Agreement and certify  
 9 the Settlement Class is granted. The Court will make a final determination as to the fairness,  
 10 reasonableness, and adequacy of the Settlement after the Final Approval Hearing.

11         10. The Court appoints Nicole Mael, Guy Mael, Nadine Vigliano, Britney Morea,  
 12 Angela Bertucci, and Tina Wiepert as Class Representatives and Terrell Marshall Law Group  
 13 PLLC and Andersen Sleater Sianni LLC as Class Counsel.

14         11. The Court appoints CPT Group, Inc. as Settlement Administrator to fulfill the  
 15 functions, duties, and responsibilities of the Settlement Administrator as set forth in the  
 16 Settlement Agreement and this Order. By accepting this appointment, the Settlement  
 17 Administrator has agreed to the Court's jurisdiction solely for purposes of enforcement of the  
 18 Settlement Administrator's obligations under the Settlement Agreement. The Court approves  
 19 the estimated Settlement Administration Expenses.

20         12. The Court finds that the method of providing notice to Settlement Class  
 21 members specified in section five of the Settlement Agreement, the forms of notice, the method  
 22 for submitting claims, and the manner of providing for exclusion requests and objections to the  
 23 Settlement specified in section seven of the Settlement Agreement are reasonable and  
 24 appropriate, and satisfy the requirements of due process and the Federal Rules of Civil  
 25 Procedure.  
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1           13.     The Settlement Administrator shall cause the Notice Plan to be commenced on  
 2 or before 60 days after entry of this Order. The Notice Plan includes Email Notice to  
 3 Settlement Class Members for whom an email address is available and who did not purchase  
 4 the Pet Food on Amazon.com and Chewy.com, mailed Postcard Notice to all Settlement Class  
 5 Members for whom a mailing address can be obtained and who did not purchase the Pet Food  
 6 on Amazon.com and Chewy.com, and an online media campaign that is designed to reach over  
 7 70% of Settlement Class Members. The Settlement Administrator will send an email no later  
 8 than 30 days before the expiration of the Claim Period to all Settlement Class Members who  
 9 have not submitted claims for whom an email address is available. The Settlement  
 10 Administrator will also make the Long Form Notice and other relevant documents, including  
 11 Class Counsel's motion for attorneys' fees, litigation costs and Service Awards, available on  
 12 the Settlement Website.

13           14.     Amazon.com will separately notify Settlement Class Members who purchased  
 14 the Pet Food on Amazon.com. The Court specifically approves the email that Amazon.com will  
 15 send. This email will be in substantially the form as that attached as Exhibit H to the Settlement  
 16 Agreement. The Court directs Amazon.com to send the email within 60 days following entry of  
 17 this Preliminary Approval Order.

18           15.     The Court further directs Amazon.com to provide the Settlement Administrator  
 19 with a spreadsheet, indicating the total amount (in dollars) of (i) Evanger's Hunk of Beef, (ii)  
 20 Evanger's Braised Beef, or (iii) Against the Grain Pulled Beef with Gravy that those Settlement  
 21 Class members purchased from Amazon.com between the dates of December 1, 2015 and June  
 22 30, 2017. The Settlement Administrator will use these amounts to verify qualified claimants'  
 23 purchases for purposes of submitting a claim. Amazon.com must provide the Settlement  
 24 Administrator with this spreadsheet within 30 days of entry of this Order.

25           16.     Chewy.com also will separately notify Settlement Class Members who  
 26 purchased the Pet Food on Chewy.com. The Court specifically approves the email that  
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Chewy.com will send. This email will be in substantially the form as that attached as Exhibit I to the Settlement Agreement. The Court directs Chewy.com to send the email within 60 days following entry of this Preliminary Approval Order.

17. The Court further directs Chewy.com to send within 30 days of entry of this Order a spreadsheet containing names, contact information, and the total amount (in dollars) of (i) Evanger's Hunk of Beef, (ii) Evanger's Braised Beef, or (iii) Against the Grain Pulled Beef with Gravy that those Settlement Class members purchased from Chewy.com between the dates of December 1, 2015 and June 30, 2017. The Settlement Administrator will use these amounts to verify qualified claimants' purchases for purposes of submitting a claim.

18. To participate in the Settlement, Settlement Class Members must submit a simple Claim Form no later than **March 9, 2020**, which they may do by mail or online through the Settlement Website.

19. Any member of the Settlement Class may request to be excluded from the Settlement Class by sending, by first class mail, a written exclusion to the Settlement Administrator postmarked on or before **March 9, 2020**. The request for exclusion must include the name of this action, *Mael v. Evanger's Dog and Cat Food Co.*, the Settlement Class member's name, address, and telephone number where he or she may be contacted and a statement that the member of the Settlement Class submitting the request wishes to be excluded from the Settlement of this litigation, and personally signed by the member of the Settlement Class submitting the request. Any member of the Settlement Class who submits a timely and valid exclusion request shall not: (i) be bound by the Final Approval Order and Judgment; (ii) be entitled to relief under this Settlement Agreement; (iii) gain any rights by virtue of this Agreement; or (iv) be entitled to object to any aspect of this Agreement.

20. Any member of the Settlement Class may object to this Agreement by filing a written statement with the Court by **March 9, 2020** that includes: his or her full name; address; telephone number where he or she may be contacted; the telephone number or numbers that he

1 or she maintains were called; all grounds in detail for the objection, with factual and legal  
 2 support for each stated ground; whether the objection applies only to the objector, to a specific  
 3 subset of the Settlement Class, or to the entire Settlement Class; the identity of any witnesses  
 4 he or she may call to testify; copies of any exhibits that he or she intends to introduce into  
 5 evidence at the Final Approval Hearing; the identity (including name, address, phone number  
 6 and email) of any lawyer who will be representing him or her with respect to any objection, and  
 7 a statement of whether he or she intends to appear at the Final Approval Hearing with or  
 8 without counsel. Any payment or other consideration given to an objector or objector's counsel  
 9 for forgoing or withdrawing an objection, or forgoing, dismissing, or abandoning an appeal  
 10 from a judgment approving a class settlement shall require Court approval.

11 21. The Court directs the Settlement Administrator to file with the Court no later  
 12 than 20 days before the Final Approval Hearing a sworn declaration containing the information  
 13 set forth in section 6.4 of the Settlement Agreement. This information includes (a) confirmation  
 14 that the Email and Postcard Notices were sent to Settlement Class members as section 6.4  
 15 requires; (b) confirmation that the Online Notices were timely published in accordance with the  
 16 Notice Plan; (c) a tally of persons who opted out of the Settlement Class pursuant to section  
 17 7.2; (d) a tally of objections received; (e) confirmation that the Settlement Administrator timely  
 18 reviewed all claims for deficiencies and fraud in accordance with the Settlement Agreement; (f)  
 19 a tally of the total number of valid claims submitted; and (g) confirmation that the Settlement  
 20 Administrator complied with 28 U.S.C. § 1715 by serving notice of the settlement upon the  
 21 various state attorneys general and any other appropriate officials.

22 22. The Court directs Amazon.com and Chewy.com to file with the Court no later  
 23 than 20 days before the Final Approval Hearing sworn declarations confirming that  
 24 Amazon.com and Chewy.com sent emails addresses associated with Amazon.com and  
 25 Chewy.com to customers who purchased the Pet Foods between December 1, 2015 and June  
 26 30, 2017.  
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1           23.     The Settlement Administrator, Amazon.com, and Chewy.com shall provide  
2 Class Counsel with a draft of the declarations five business days before the declarations are  
3 filed.

4           24.     The Court will hold a Final Approval Hearing on **May 8, 2020, at 9:30 a.m.** in  
5 Courtroom B of the U.S. Courthouse, 1717 Pacific Avenue, Room 3100, Tacoma, Washington  
6 98402-3200 to finally determine whether the Settlement Class should be certified under Rule  
7 23(a) and (b)(3) of the Federal Rules of Civil Procedure; to determine whether the Settlement  
8 Agreement is fair, reasonable, and adequate, and should be approved by the Court; to determine  
9 whether the Final Approval Order and Judgment should be entered; to consider the motion for  
10 attorneys' fees, reimbursement of litigation costs, and Service Awards; and to rule on any  
11 other matters that the Court may deem appropriate. At the Final Approval Hearing, the Court  
12 may enter the Final Approval Order and Judgment in accordance with the Settlement  
13 Agreement that will adjudicate the rights of Settlement Class Members.

14           25.     Any interested person who has not excluded himself or herself from the  
15 Settlement Class and who filed a written objection on or before **March 9, 2020** may appear at  
16 the Final Approval Hearing to show cause why the proposed Settlement Agreement should or  
17 should not be approved as fair, reasonable, and adequate. The Court will consider all properly  
18 submitted objections. Any Settlement Class Member who does not submit an objection in the  
19 manner provided above shall be deemed to have waived any objection to the Settlement  
20 Agreement and shall forever be foreclosed from making any objection to certification of the  
21 Settlement Class, to the fairness, adequacy and reasonableness of the Settlement Agreement,  
22 and to any attorneys' fees, litigation cost reimbursements, and Service Awards approved by the  
23 Court.

24           26.     Class Counsel's motion for approval of attorneys' fees, litigation costs, and  
25 Service Awards shall be filed on or before **February 10, 2020**, which is 30 days before the  
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1 deadline for Settlement Class members to opt out or object to the Settlement Agreement. This  
 2 deadline complies with *In re Mercury Interactive Corp.*, 618 F.3d 988, 994 (9th Cir. 2010).

3 27. All memoranda, declarations, responses to objections, and other evidence in  
 4 support of the motion for final approval of the Settlement Agreement shall be filed on or before  
 5 **April 20, 2020.**

6 28. All proceedings in this Action other than those that are necessary to carry out, or  
 7 incidental to carrying out, the terms and conditions of this Order are stayed and suspended until  
 8 further order of the Court.

9 29. Pending entry of the Final Approval Order and Judgment, Plaintiffs, Settlement  
 10 Class members, and any person or entity allegedly acting on behalf of the Settlement Class,  
 11 either directly, representatively, or in any other capacity, are preliminarily enjoined from  
 12 commencing or prosecuting against the Released Parties any action or proceeding in any court  
 13 or tribunal asserting any of the Released Claims provided, however, that this injunction shall  
 14 not apply to individual claims of any Settlement Class Member who timely exclude themselves  
 15 in a manner that complies with this Order. This injunction is necessary to protect and effectuate  
 16 the Settlement Agreement, this Order, and the Court's flexibility and authority to effectuate this  
 17 Settlement Agreement and to enter judgment when appropriate, and is ordered in aid of the  
 18 Court's jurisdiction and to protect its judgments pursuant to 28 U.S.C. § 1651(a).

19 30. The Court retains jurisdiction over the Action and all matters arising out of or  
 20 connected with the proposed Settlement Agreement. The Court reserves the right to adjourn or  
 21 continue the date of the Final Approval Hearing without further notice to Settlement Class  
 22 members, and retains jurisdiction to consider all further applications arising out of or connected  
 23 with the Settlement Agreement. The Court may approve or modify the Settlement Agreement  
 24 without further notice to Settlement Class members.

25 31. If the Effective Date does not occur, the Parties will return to the status quo ex  
 26 ante, for all litigation purposes, as if no settlement had been negotiated or entered into and thus  
 27

1 this Order and all other findings or stipulations regarding the Settlement, including but not  
 2 limited to certification of the Settlement Class will be automatically void, vacated, and treated  
 3 as if never filed.

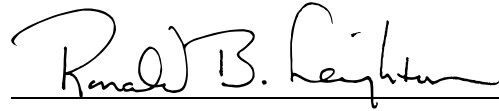
4 32. The following timeline will govern proceedings through the Final Approval  
 5 Hearing:

| 6   | 7 | 8  | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27 |
|---|---|--|---|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|
| DEADLINE  |   | EVENT  |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |
| Ten business days after entry of this Order<br>November 18, 2019  |   | Defendants make initial payment to<br>Settlement Administrator   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |
| Thirty days after entry of this Order<br>December 9, 2019   |   | Chewy.com to provide Settlement<br>Administrator with spreadsheet listing<br>Settlement Class Members who purchased<br>products on Chewy.com and the total<br>amount of those purchases.   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |
| Thirty days after entry of this Order<br>December 9, 2019   |   | Amazon.com to provide Settlement<br>Administrator with spreadsheet listing<br>Settlement Class Members who purchased<br>products on Amazon.com and the total<br>amount of those purchases. |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |
| Thirty days after entry of this Order<br>December 9, 2019   |   | Settlement Website is active   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |
| Sixty days after entry of this Order<br>January 7, 2020   |   | Deadline to commence Notice Plan   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |
| Thirty days before the Exclusion/Objection<br>deadline<br>February 10, 2020                             |   | Deadline for Class Counsel to file motion<br>for attorneys' fees, reimbursement of<br>litigation costs, and for service awards   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |
| Sixty days after the Settlement Administrator<br>commences Notice Plan<br>March 9, 2020                 |   | Deadline for Settlement Class Members to<br>submit claims, exclusion requests, and<br>objections   |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |
| Thirty days after the deadline to submit<br>claims, exclusion requests, and objections<br>April 8, 2020 |   | Settlement Administrator completes review<br>of claims.  |   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |

|  |  |
|--|--|
| Forty days after the<br>Objection/Exclusion/Claim deadline<br>April 20, 2020 | Deadline to file responses to objections,<br>motion for final approval, Settlement<br>Administrator declaration, and Amazon<br>declaration |
| May 8, 2020 at 9:30 a.m.   | Final Approval Hearing   |

IT IS HEREBY ORDERED.

DATED this 24<sup>th</sup> day of October, 2019.



Ronald B. Leighton  
United States District Judge